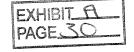
- things. One is that the respondent says "no" or "not
- 2 sure" to 6. Okay?
- 3 Do you understand that?
- 4 A. Yes.
- 5 Q. The second is that they then typed some sort of
- answer to what government agency, Question 7. Okay?
- 7 Assume that.
- 8 A. Yes.
- 9 Q. The -- now, my question is isn't it true that
- 10 after having typed something to 7, the respondent could
- 11 go back and change their answer to 6?
- 12 A. I believe it -- yes. It's possible that they
- 13 could do that.
- 14 Q. And you have no way of tracking that in your
- 15 data; correct?
- 16 A. Whether they changed their answer?
- 17 Q. That's right.
- 18 A. No, I do not.
- 19 Q. Do you know if, in terms of generating reports
- on the -- on Question 7, you had the option to print a
- 21 report solely related to those folks who had said "yes"
- 22 to Question 6?
- 23 A. No. I could not do that. I mean, I could
- 24 manually. And actually, I did. It's in here. I
- 25 manually went -- looked at those answers. As a matter

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- 1 Q. Now, I see this as a five-page report with 172
- 2 responses. Do you agree?
- 3 A. Yes.
- Q. So does that change your opinion that, as,
- number 1, whether a person who answered something other
- than "yes" to Question 6 could type a response to
- 7 Question 7?
- 8 A. Apparently, they could.
- 9 Q. And does that refresh your recollection then
- that you, in fact, took no steps to preclude that from
- 11 happening?
- 12 A. Yes. I did take steps to preclude it.
- 13 Apparently, I overlooked this one. I missed this one.
- 14 O. And the same with respect to Question 9, which
- is the same, "What government agency," question. And
- 16 Ouestion 9 we see, I think, 167 responses --
- 17 A. Yes.
- 18 Q. -- to that question?
- 19 A. Yes.
- Q. And that's -- you would agree that's greater
- than the number of people that answered "yes" to
- 22 Ouestion 8?
- 23 A. Yes. Apparently, I just -- that this is what's
- called "skip patterns" were either -- were -- didn't --
- weren't effective. But, yes, that's correct. They all

- 1 answered that question.
- Q. Was there anything in the way the Zoomerang
- 3 survey operates that would preclude a respondent, after
- 4 they had submitted one page of answers, from going back
- 5 to that prior page?
- A. I'm sorry. Were they precluded from going
- 7 back?
- 8 Q. Right.
- 9 A. Yes.
- 10 Q. So if you had separated 6 and 7 into different
- pages, then a respondent -- even if they saw Question 7,
- they would not have been able to go back and change
- 13 Question 6; correct?
- 14 A. That's correct.
- Q. But the way you set it up, with both questions
- on the same page, that safeguard was not in place;
- 17 correct?
- 18 A. That's correct.
- 19 Q. If you would refer back to Exhibit 143 for a
- 20 moment, the article?
- 21 A. Yes.
- 22 Q. Turning now to page 305, on the left-hand
- column, there's a subsection entitled, "The Nature of
- 24 Controls."
- Do you see that?



- 1 A. Yes.
- Q. It says, "In any study, it is important to have
- the ability to control the situation in which the study
- 4 is being conducted so as to eliminate the role of
- 5 extraneous forces and competing explanations."
- 6 Do you see that?
- 7 A. Yes.
- 8 Q. You wrote that; correct?
- 9 A. Yes.
- 10 Q. That's not qualified by any statement that in a
- perception study a control is unnecessary; correct?
- A. As I wrote it then, that was my view.
- 13 Q. And your view has changed now?
- 14 A. Yes. I think, as I said in earlier testimony,
- that it really depends on the nature of the -- the
- 16 study. And I think if you read more in here --
- Q. Well, let's read some more. In the same
- paragraph, after the parenthetical to Cohen, you wrote,
- 19 "The control ad group" -- and what does that mean, "the
- 20 control ad group"?
- 21 A. I'm sorry. Where are you?
- 22 Q. Same paragraph, under the heading, "The Nature
- of Controls," about halfway down that paragraph, after
- 24 the parenthetical.
- 25 A. Yes. Yes. Okay.



- 1 Q. It says "the control ad group." Can you --
- 2 A. Yes.
- Q. Just so we're all clear, can you tell us what
- 4 that means?
- 5 A. That would be a group that would see the
- 6 control ad, as opposed to seeing the test ad.
- 7 Q. The test ad would be what a layman might call
- 8 "the real thing"?
- A. What's -- "the real thing," the ad that --
- 10 Q. That you want to test.
- 11 A. That's correct, yes.
- 12 Q. And the control is the advertisement that you
- used to filter out other explanations; correct?
- 14 A. That's correct.
- 15 Q. All right. It says, "The control ad group, to
- which respondents are randomly assigned, receives a
- 17 control ad with as few differences from the challenged
- 18 test ad as possible -- with the exception of a
- 19 challenged claim"; correct?
- 20 A. That's correct.
- Q. And that is the primary accepted method of
- 22 constructing a control, is it not?
- 23 A. If you can do it. As I said in -- earlier this
- 24 morning, you can't always do that.
- 25 And one of the critical things -- go back to

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- one of the things you noted in Simonson, it has to be, I
- think, the proper -- the word was a "proper" control.
- 3 It has to be possible to have a control. And as I said,
- 4 it isn't -- it isn't always possible to have a control
- at all because it may not be appropriate or proper for
- 6 the subject being studied.
- 7 Q. And you concluded in this case that we're here
- 8 today about that that was not possible to conduct a --
- 9 construct a control?
- 10 A. That met the test of being a proper control
- and -- and equivalent to the test ad, or in this case,
- test Web page. The critical term there is "proper and
- 13 equivalent."
- Q. You wrote -- well, you quoted an argument made
- by Stouffer, which I take it was the respondent to an
- 16 FTC claim; is that correct? That Stouffer was a
- 17 respondent?
- 18 A. Yes.
- 19 Q. You wrote, "Stouffer argued that the FTC has
- 20 made abundantly clear that a control ad is required to
- 21 be used for both open-ended --
- 22 A. I'm sorry. I'm sorry. Where are you?
- Q. Under "Control Ad Groups and Open-Ended
- 24 Questions."
- 25 A. Okay.

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- nothing requiring a control ad for open-ended questions;
- 2 correct?
- 3 A. That's correct.
- Q. However, you concluded this paragraph with this
- statement, "However, it is noteworthy that this
- standard, namely, that a control ad is not necessary, is
- 7 likely to be inconsistent with certain --
- 8 A. Wait, wait, wait. Where are you now?
- 9 Q. The last sentence on this page?
- 10 A. Okay.
- 11 Q. Let me start over.
- 12 A. I'm with you. Okay.
- 13 O. You ended this section with the statement,
- 14 "However, it is noteworthy that this standard, namely,
- that a control ad is not necessary, is likely to be
- inconsistent with certain Lanham Act cases involving
- exploiting misleadingness, in which the court has said
- that, " quote, "'a control mechanism would likely be, '"
- 19 quote, "'indispensable,'" unquote; correct?
- 20 A. Yes.
- Q. You were aware of that authority when you
- 22 constructed your survey; correct?
- 23 A. That's correct. And you might just -- and you
- 24 might also go on in the next page, on page 306, is where
- I identify some of the problems with having a control.

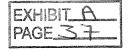
- 1 Q. So in your -- you're aware that Hollander
- 2 created a control for his survey; correct?
- 3 A. Yes, I am.
- Q. And you know exactly what he did to establish
- 5 that control, namely, substituting Car.org for DMV.org
- 6 everywhere it appeared?
- 7 A. Yes.
- 8 O. Correct?
- 9 A. Yes.
- 10 Q. And that doesn't meet your test of a proper
- 11 control?
- 12 A. No, it does not.
- Q. And why not?
- 14 A. Because it's neither -- it's not equivalent. I
- mean, it's not -- it -- again, remember, the target
- 16 market for online traffic schools is people who would
- 17 consider going to those. So it had to be something that
- is somehow related to traffic schools or online traffic
- 19 schools. And I don't believe that car- -- or Cars.org
- is something that a consumer, if they were looking for
- an online traffic school, would think, "Gee, that's the
- Web site," or the Internet link that they would use to
- go to find a traffic school. So I don't believe it's
- 24 appropriate or equivalent at all.
- Q. If it's not an appropriate control, then the



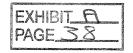
- 1 procedures that led to those results.
- 2 BY MR. DAUCHER:
- Q. Well, he did remove the potentially misleading
- 4 claim from the control group; correct?
- A. He substituted Car.org for the DMV.org, yes.
- Q. And thereby removed the potentially misleading
- 7 claim?
- A. He substituted Car.org for that, yes.
- Q. Now, you wrote on this page 306, in the first
- 10 full paragraph, on the second column --
- MR. MAKOUS: Page 306?
- MR. DAUCHER: Yes.
- 13 THE WITNESS: Okay.
- 14 BY MR. DAUCHER:
- 15 Q. That -- for example, the first approach in
- that refers to purging the misleading claim; correct?
- 17 A. Yes.
- 18 Q. You wrote that, "The first approach, using the
- 19 purged or cleansed ad control, may be the best choice
- when the control ad is virtually identical to the
- 21 challenged or test ad, with the exception that the
- challenged claim is excised"; correct?
- 23 A. Yes.
- Q. Isn't that exactly what Hollander did in this
- 25 case?



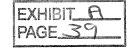
- 1 A. No. I don't believe so. He substituted
- 2 something else that, in my judgment, is likely to
- 3 confuse consumers, make -- as I said more than once this
- 4 morning, in my judgment, it doesn't meet the test of a
- 5 proper control.
- 6 Q. Because consumers looking at a Car.org control
- 7 are also going to draw an affiliation to the government
- 8 in your view?
- 9 A. I don't know what they're going to do.
- MR. MAKOUS: Let's take a break, Counsel.
- MR. DAUCHER: There's a question pending.
- MR. MAKOUS: We've been going two hours.
- MR. DAUCHER: Let him finish the question
- 14 then.
- MR. MAKOUS: All right. Let me just hear the
- 16 question back.
- 17 (The record was read.)
- 18 THE WITNESS: I don't believe they are. As a
- 19 matter of fact, I don't -- I can't imagine that they're
- 20 going to be making any kind of an affiliation to -- to
- 21 any government agency.
- 22 BY MR. DAUCHER:
- Q. Let me -- just one follow-up, please.
- 24 Wouldn't then that indicate that the use of
- 25 Car.org would be an effective control in this case



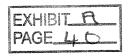
- because there's no possibility in your view of an
- 2 affiliation?
- MR. MAKOUS: Objection. Asked and answered.
- 4 THE WITNESS: As I said, I don't believe
- 5 it's -- it's an appropriate control because it's -- it's
- 6 not in any way related to traffic schools or online
- 7 traffic schools. So I don't believe that -- that the
- 8 respondents would -- that would have any effect on them.
- 9 MR. DAUCHER: Okay. We'll take a break.
- MR. MAKOUS: Thank you.
- 11 (A break was taken.)
- MR. DAUCHER: Okay. Let's go back on the
- 13 record.
- 14 BY MR. DAUCHER:
- Q. So if you refer to 144, the expert report, on
- page 3, you -- under "Scope of Engagement," the first
- sentence, it says you were retained by Lewis, Brisbois,
- attorneys representing plaintiffs, to provide expert
- opinions on consumers' perceptions of the ownership
- 20 and/or sponsorship of an Internet address/link to the
- 21 DMV.org Web site and the Web site belonging to DMV.org.
- That's the scope of your assignment as you
- 23 understood it; correct?
- A. That's correct.
- Q. You indicated, in your discussion with



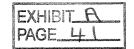
- 1 Mr. Creditor, that he advised you that their target
- 2 market was 18 to 50 years old; correct?
- 3 A. That's correct.
- Q. But the study that you conducted was 18 to 60;
- 5 is that correct?
- A. That's correct.
- Q. So why did you not try to conform the study to
- 8 the information you received from Mr. Creditor?
- 9 A. As I recall, in the discussion I said -- you
- 10 know, I think he said that -- he didn't say this is
- 11 their only target market. He said, "Most of our
- 12 customers are within this range." So I just made it a
- 13 little bit broader.
- Q. And with respect to the studies that you did,
- you studied the traffic school results, but you made no
- 16 efforts to study drivers ed result -- education results;
- 17 correct?
- 18 A. That's correct.
- 19 Q. You were -- did you ever have any discussion
- about doing a companion study on drivers education?
- 21 A. There was some initial discussion about that,
- 22 but then it was a time issue. So they said because of
- the timing, we could only focus on one.
- Q. And you gave no -- you give no opinion in this
- 25 case as to drivers education; correct?



- 1 A. That's correct.
- Q. On page 5, at the bottom, the last sentence
- there says, "Those who were qualified, i.e. answered
- affirmatively to the screening questions, were then
- asked a series of closed-end and open-end questions
- 6 related to different aspects of the issues studied."
- 7 You wrote that; correct?
- 8 A. Yes.
- 9 Q. And that's an accurate description of what you
- 10 did; correct?
- 11 A. That's correct.
- Q. Okay. With respect to Study 2, the Google
- 13 result study, can we refer to it that way?
- 14 A. That's fine.
- Q. You showed them -- after qualifying them, you
- showed them a Google result. And then you focused their
- 17 attention on the DMV.org result; correct?
- 18 A. That's correct. I showed them a page of
- 19 results from Google and then focused on that one
- 20 Internet link.
- Q. And then you described the next question as,
- quote, "They were then asked" -- and I'm on page 7,
- going over to page 8 -- "They were then asked, with an
- open-end question, "comma, "whose Web site the link
- 25 directs them to."



- 1 know" according to your report here on page 8 of the
- 2 declaration?
- MR. MAKOUS: Put it together. Right.
- 4 THE WITNESS: What number? Yes. Okay. That's
- 5 fine.
- 6 I'm sorry. Where are you now?
- 7 BY MR. DAUCHER:
- 8 Q. On --
- 9 A. Yes. That's correct.
- 10 Q. Okay. Isn't that a low number, based on your
- 11 experience, for a "don't know" response?
- MR. MAKOUS: Objection. Argumentative.
- 13 THE WITNESS: It really is a function of the
- 14 claim that's being made and the consumers' perception of
- it. If I were to ask someone a brand name -- like, I
- 16 would say to them, "Here's a box of cereal," and it's
- 17 got Cheerios on it, and I ask them what brand it is, I
- 18 would get virtually none saying it. So it really --
- 19 MR. MAKOUS: None saying what?
- THE WITNESS: I don't know.
- MR. MAKOUS: Okay.
- THE WITNESS: So it really is a function of the
- 23 claim that's made.
- 24 BY MR. DAUCHER:
- Q. You didn't tell people not to guess; correct?



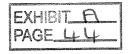
- 1 A. That's correct.
- Q. And you didn't give them the affirmative choice
- of "not sure"?
- A. Again, I said to them that -- I asked for
- 5 their perceptions. And their perceptions was for -- for
- 57 percent of them -- that they answered the question,
- 7 "Whose Web site it links" -- "directs them
- 8 to, " 57 percent on an unaided basis said the
- 9 "Department of Motor Vehicles." And as you've noted,
- 10 a few said "California Department of Motor Vehicles."
- 11 And some -- many said "DMV."
- 12 Q. In reporting your answers for Study 2, you
- never broke out "California" results, specific
- "California" results, from general "DMV" or "Department
- of Motor Vehicle" results; correct?
- 16 A. That's correct. I didn't see a need to do
- 17 that.
- 18 Q. All the respondents were Californians, though?
- 19 A. That's correct.
- Q. Now, on Study 2, Question 6 and 7, "Is this
- 21 Web site link endorsed by any government agency," and
- then the familiar question, "What government agency,"
- 23 for 7.
- 24 A. Yes.
- Q. Are those questions appearing on the same page

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- 1 again?
- MR. MAKOUS: Make sure we're on the right thing
- 3 here. Let's try to get the right document in front of
- witness here so we're -- the trouble is not the
- defendants' fault because we don't have exhibit tabs in
- the photocopies here and it's hard to locate these tabs.
- 7 THE WITNESS: And it's --
- 8 MR. MAKOUS: What would you like?
- 9 THE WITNESS: Study 2. You're asking about
- 10 Study 2?
- 11 BY MR. DAUCHER:
- 12 Q. Yes.
- MR. MAKOUS: What I'm placing before the
- 14 witness is Study 2, working copy.
- 15 THE WITNESS: Yes.
- 16 BY MR. DAUCHER:
- Q. And so the same answers would apply that we
- 18 discussed with Study 3, namely, that first of all,
- 19 somebody looking at Question 6 sees Question 7 at the
- 20 same time; correct?
- 21 A. That is correct.
- Q. Nothing prohibits someone who answers
- Question 6 "no" or "not sure" from responding to
- 24 Question 7?
- 25 A. I don't recall whether it -- they -- they



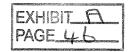
- 1 unusual.
- Q. The only questions that you did that with in
- 3 Study 2 were Questions 6 and 7 and 8 and 9; correct?
- 4 A. That's correct.
- 5 Q. And the only questions you did that with on
- 6 Study 3 were Questions 6 and 7 and 8 and 9; correct?
- 7 A. That's correct.
- Q. And it's your opinion, with respect to all
- 9 those, that that did not prime an answer to the first
- 10 question in each sequence?
- 11 A. No. I don't believe it did.
- 12 Q. And it's your opinion that that did not bias
- the answers to the first questions?
- A. No. Quite the contrary. I think it -- it --
- no. It didn't bias them, but it made them think about
- it and provide a realistic answer because they knew that
- in answering 6 -- take that 6 and 7 sequence, that "Yes,
- and now I've got to think what government agency I think
- 19 this relates to."
- And, again, if I can continue, they also had
- 21 the -- the Internet link before them when they made that
- 22 decision, when they answered that question.
- Q. So in this case, you actually conducted what's
- 24 known as a reading test; correct?
- MR. MAKOUS: Objection. Which case?



- 1 MR. DAUCHER: With respect to the Google test
- 2 result.
- 3 THE WITNESS: It's a -- it's a perception
- 4 study.
- 5 BY MR. DAUCHER:
- Q. Do you understand what I mean by "reading
- 7 test"?
- 8 A. Yes.
- 9 Q. What's your understanding of that?
- 10 A. When you ask a question, that you can refer to
- 11 information in the ad.
- Q. So in other words, a stimuli is before the
- 13 respondent when they're asking the question?
- 14 A. That's correct.
- 15 Q. And not taken away?
- 16 A. That's correct.
- Q. When it's taken away, it's called a "memory
- 18 test"?
- 19 A. Or a "perception study." I mean, it's -- it
- 20 can be a memory study. But in this case, the intent
- 21 behind it was to give them this information. It's
- clearly not a lot of information for them to go back and
- look at. The information is very discrete. It's simply
- 24 the Web link.
- 25 Q. Why, with respect to Study 2, did you leave the

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- stimuli before the viewer, but not in Study 3?
- 2 A. Because Study 3, I think, was -- it would have
- 3 made it a memory test.
- Q. To leave the --
- A. No -- I'm sorry. I'm sorry -- it would have
- 6 made it -- would made it -- to have -- would have made
- 7 it into simply a reading -- reading test.
- Q. Are you familiar with the authority that's been
- 9 published in Trademark Reporter about reading and memory
- 10 tests?
- MR. MAKOUS: Objection. Overbroad.
- 12 BY MR. DAUCHER:
- 13 Q. Let me lay some foundation.
- Do you know what the Trademark Reporter is as a
- 15 journal?
- 16 A. Yes.
- 17 Q. Do you subscribe to it?
- 18 A. No.
- 19 Q. Have you read the articles in there related to
- reading and memory tests published in the last year?
- 21 A. No, I have not.
- Q. When, in your view, is it appropriate to do a
- 23 reading test versus a memory test?
- A. I don't believe it's ever appropriate to do a
- 25 reading test. I think it should always be a memory test



- where the stimuli is taken away, at least in the
- 2 first -- if you want someone to look for a specific
- aspect of a claim, that's certainly appropriate on a
- second exposure to have a reading test. But the first
- test, it should be without the stimuli present.
- Q. But in Study 2 the stimuli is present. So you
- 7 do conduct a reading test in Study 2?
- A. Again, because of the nature of the stimuli,
- which is simply a straightforward Internet link, it
- 10 doesn't have -- it doesn't make any express or implied
- claims other than here is a link coming right off of a
- 12 Google search page. It simply makes that statement.
- Q. Didn't you just testify that a reading test was
- 14 never appropriate in your view?
- 15 A. I said that it's -- there are times when you
- 16 would do -- when what you want them to do is look at the
- 17 stimuli and react to it. And that's what I had them do
- 18 in Study 2.
- 19 Q. Isn't it true, in the context of surveys, that
- 20 a reading test is generally more appropriate with a
- 21 higher involvement decision?
- 22 MR. MAKOUS: Objection. Vaque. Lacks
- 23 foundation.
- 24 THE WITNESS: No. I don't believe that -- that
- a reading test, if -- even if it's a high involvement

